Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SOUTHWEST SUNSITES, INC., *et al.*
Petitioners,

v.

FEDERAL TRADE COMMISSION
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Where §13(b) of the Federal Trade Commission Act, 15 U.S.C. §53(b), explicitly limits district court injunctive authority to preventing violations of law, did the Court of Appeals for the Fifth Circuit err in authorizing the district court to order the unprecedented escrowing of defendants' assets pending administrative proceedings?

2. Whether *Cort v. Ash*, 422 U.S. 66 (1975), and its progeny require this Court to reconsider the doctrine that equitable remedies can be implied from a statute which provides for no such remedies.

3. Whether a preliminary injunction prohibiting defendants from "making misrepresentations and failing to disclose material facts . . . concerning investment potential and suitability of land . . ." without further elaboration, meets the requirement of F.R.Civ. P. 65 that an injunction be "specific."

LIST OF PARTIES

The plaintiff is the Federal Trade Commission. The defendants-petitioners are Southwest Sunsites, Inc., Green Valley Acres, Inc., and Green Valley Acres, Inc. II. There are no parent companies, subsidiaries or affiliates of any corporate party. Four other defendants prevailed in the district court and were not involved in the appeal to the Court of Appeals and are not petitioners herein. They are Sydney Gross, Edwin Kritzler, Porter Realty, Inc., and Irvin Porter.

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DECISIONS BELOW

The opinion of the Fifth Circuit Court of Appeals, *Federal Trade Commission v. Southwest Sunsites, Inc.*, 665 F.2d 711 (5th Cir., 1982), is appended (p. 1a). The unreported opinion of the District Court for the Northern District of Texas and the magistrate's recommended opinion are appended (p. 21a and p. 27a, respectively).

JURISDICTION

The opinion of the Court of Appeals was filed on January 14, 1982. No petition for rehearing was filed in the Court of Appeals. This Court has jurisdiction under 28 U.S.C. §1254.

STATUTES INVOLVED

The relevant statutes are section 5 of the FTC Act, 15 U.S.C. §45, section 13(b) of the FTC Act, 15 U.S.C. §53(b), and section 19 of the FTC Act, 15 U.S.C. §57b. These statutes are reproduced in pertinent part in the appendix to this petition (p. 44a, p. 48a, and p. 49a, respectively).

STATEMENT OF THE CASE

Petitioners, defendants below, are corporations whose business is the sale of unimproved tracts of land in Texas. The respondent, plaintiff below, is the Federal Trade Commission ("FTC").

On March 4, 1980 the FTC filed suit in the U.S. District Court for the Northern District of Texas, seeking a preliminary injunction prohibiting violations of the FTC Act pending administrative action under section 5 of the FTC Act. Jurisdiction was founded upon section 13(b) of the FTC Act, 15 U.S.C. §53(b), which allows the FTC to seek a preliminary injunction against ongoing or imminent violations of the FTC Act pending the issuance of an administrative complaint by the FTC. The FTC also sought an order escrowing petitioners' assets, and an order requiring notification to past customers of possible misrepresentations which might be proved in an upcoming administrative action. The proposed escrow was to assist the FTC if it decides to file a district court action on behalf of consumers under §19 of the FTC Act *after* administrative proceedings under §5 of the FTC Act are concluded.

The district court issued an injunction prohibiting misrepresentations in connection with the defendants' sale of land and ordering unspecified disclosures of material facts. The district court declined to order the requested ancillary relief, holding that these actions were beyond the scope of relief permissible under §13(b), and that an insufficient showing of dissipation of assets was made to justify the relief even if permissible. The FTC appealed the refusal to order ancillary

relief to the Fifth Circuit Court of Appeals. Defendants cross-appealed on the grounds that the district court's injunction was not sufficiently specific.

The Court of Appeals ruled that the district court does have the authority to escrow defendants' assets under §13(b) and to order notification of past customers that misrepresentations may have occurred. The Court of Appeals remanded the case to the district court for consideration whether the facts of the case warrant either form of ancillary relief. Finally, the Court of Appeals ruled that the district court's preliminary injunction prohibiting "misrepresentations" and "failure to disclose material facts" was not vague. The Court of Appeals, however, did remand to the district court with directions to incorporate within the preliminary injunction certain references that were made to a magistrate's opinion and report. 665 F.2d at 723-24.

The defendants timely filed this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

This case presents important questions regarding the authority of a district court under §13(b) of the FTC Act. The Court of Appeals, although conceding that the plain language of the statute permits only the enjoining of conduct which violates the FTC Act, 665 F.2d at 717, held that the district court has authority to enjoin acts neither in violation nor alleged to violate the FTC Act. Specifically, the Court of Appeals authorized an unprecedented escrow of defendants' assets and income pending administrative proceedings and ancillary to a potential civil action for consumer redress pursuant to §19 which may be filed at some indeterminate date in the future. The Court of Appeals further found nothing impermissibly vague in an injunction that forbids "misrepresentation" and "failure to disclose material facts" without identifying the prohibited misrepresentations or the required material facts. Each of these holdings is extraordinary and warrants review by this Court.

I. THE RULING OF THE COURT OF APPEALS AUTHORIZING AN ESCROW OF ASSETS IN §13(b) CASES IS CONTRARY TO CONGRESSIONAL INTENT AND TO THIS COURT'S DECISION IN *DE BEERS CONSOL. MINES V. UNITED STATES*, 325 U.S. 212 (1945).

Section 13(b) permits the FTC to seek preliminary injunctions to enjoin violations of the FTC Act pending the issuance of a complaint by the FTC and until the complaint is set aside or becomes final. As the Court of Appeals conceded, "the plain language of the statute speaks only of enjoining an allegedly unlawful act or practice." 665 F.2d at 717.

Despite §13(b)'s plain language, the Court of Appeals held that a district court has the power to enjoin conduct which is not in violation of the FTC Act. The Court of Appeals *inferred* this unprecedented power under the inherent equity powers doctrine advanced by this Court in *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960) and *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946).

In *Mitchell, supra*, 361 U.S. at 291-21, this Court stated: "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." Yet the "historic power of equity" does not include escrowing assets. *De Beers Consol. Mines v. United States*, 325 U.S. 212, 222-23 (1945).

The plaintiff in *De Beers* had filed an antitrust suit against foreign defendants, and asked for a sequestration of assets on the theory that defendants were withdrawing assets from the United States. This Court noted that "the purpose and effect of the [lower court's] injunction is to provide security for performance of a future order which may be entered by the [trial] court." 325 U.S. at 219. This Court concluded that a sequestration of assets was not authorized either by statute or in equity. 325 U.S. at 223. It stated, "No relief of this character has been thought justified in the long history of equity jurisprudence." 325 U.S. at 223.

The present case is indistinguishable from *De Beers*. There is no statutory authority for an escrow of assets in the FTC Act, and *De Beers* prohibits such a remedy in the absence of statutory authorization. The Court of Appeals' conclusion that an escrow can be imposed thus is contrary to *De Beers*.

There are other reasons why the Court of Appeals erred in inferring the power to escrow assets under §13(b). At the time §13(b) was enacted, in 1973, the Commission had no right to order or seek relief to redress past injuries. The Commission lacked the authority to impose such relief itself, and no statute authorized it to seek it in federal court. Section 19 was added to the FTC Act in 1975. It authorizes the FTC to seek redress for consumers in district court following the conclusion of an administrative action. The Court of Appeals ignored the fact that Congress could not have meant to allow a §13(b) proceeding to preserve relief for a later §19 proceeding when §19 did not exist at the time §13(b) was enacted.

By the explicit terms of §13(b), any injunction issued by the district court expires as soon as the administrative proceedings under §5 are concluded. However, the FTC cannot even begin to consider whether to institute a §19 suit until after it has concluded its administrative action, and thus after the injunction expires. 15 U.S.C. §57b. Because a §13(b) injunction cannot remain in effect pending the decision to prosecute an action under §19, it plainly could not have been intended to preserve relief available only under §19.

Congress in 1978 rejected a bill supported by the FTC that would have amended §13 to allow escrowing assets. The bill was rejected notwithstanding explicit findings by a House Committee that the power does not exist under §13(b):

> Under present law, since the Commission first adjudicates a complaint through the administrative process (and that routinely takes more than two years), it is unable during this time to go to court to prevent a person from wasting assets to avoid paying consumers damages for fraudulent or dishonest behavior.

H.R. Rep. No. 95-892, 95th Cong. 2d Sess. 19 (1978).

> Briefly, in contrast to the previous conference report (Report No. 95-892), the conferees struck in its entirety the "equitable relief" section, which would have allowed the Federal Trade Commission . . . to go to court to seek equitable relief (including the appointment of a trustee) in order to preserve a firm's assets for possible consumer redress if a law violation was found.

H.R. Rep. No. 95-1557, 95th Cong. 2d Sess. 13 (1978).

Despite the clear intention of Congress to withhold the power to escrow in actions brought under §13(b), the Court of Appeals has authorized this unprecedented ancillary relief pending the commencement of §19 proceedings. This broad holding warrants review by the Court.

II. THE INHERENT EQUITY POWERS DOCTRINE SHOULD BE RE-EXAMINED IN LIGHT OF *CORT V. ASH*, 422 U.S. 66 (1975), AND ITS PROGENY.

The Court of Appeals based its findings of power despite the absence of statutory authorization on the inherent powers doctrine, which holds that a court's power in equity is unlimited unless expressly restricted by statute. This doctrine has not been the subject of Supreme Court review since *Mitchell, supra,* in 1960. The doctrine is similar to the implied cause of action doctrine in that both involve a judicial inferring of remedies from statutes which do not on their face provide for such remedies.

Mitchell and *Porter* held that a court will be deemed to have full equitable power "unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity." 361 U.S. at 291, 328 U.S. at 398. This standard is similar to that once used in implying civil causes of action from federal statutes. In *J. I. Case Co. v. Borak,* 377 U.S. 426 (1964), for example, this Court implied a civil cause of action under the Securities Exchange Act of 1934. This Court stated that "it is the duty of the courts to be alert to

provide such remedies as are necessary to make effective the congressional purpose." 377 U.S. at 433. Significantly, *Case v. Borak* favorably cited both *Porter* and *Mitchell.* 377 U.S. at 434.

In a series of cases commencing with *Cort v. Ash,* 422 U.S. 66 (1975), this Court adopted a different standard from that used in *Case v. Borak* and similar cases when inferring civil causes of action from federal statutes. *See California v. Sierra Club,* 451 U.S. 287, 68 L.Ed.2d 101 (1981); *Universities Research Assn. v. Coutu,* 450 U.S. 754, 67 L.Ed.2d 662 (1981); *Transamerica Mortgage Advisors v. Lewis,* 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979).

This Court has now made it clear that "the focus of the inquiry is on whether Congress intended to create a remedy." *California v. Sierra Club, supra,* 68 L.Ed.2d 101, 110 (1981). As this Court stated in *California v. Sierra Club, supra,* 68 L.Ed.2d at 110, "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." See also *Transamerica Mortgage Advisors v. Lewis,* 444 U.S. at 15-16:

> The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. . . . While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, e.g., J. I. Case Co. v. Borak, supra, *what must ultimately be determined is whether Congress intended to create the private remedy asserted,* as our recent decisions have made clear. (emphasis added)

The present case presents a compelling example of the need for this Court's guidance as to the proper standard for applying the implied equitable remedies doctrine. The FTC Act, by its express terms, limits federal court authority to preliminary injunctions against ongoing or imminent violations of the FTC Act. The Court of Appeals found *implied* authority

for the district court to order ancillary relief in order to preserve a possible future remedy in separate proceedings which cannot begin until the administrative action is concluded. Nothing in the statute or legislative history suggests that such a remedy was intended by Congress. The Court of Appeals' quick inference of such a remedy is contrary to the *Cort v. Ash* line of cases, *supra,* which establish that congressional intent—and not judicial fiat—is the appropriate standard.

The opinion of the Court of Appeals provides an extraordinary expansion of power under §13(b). It permits the FTC to use §13(b) to obtain a preliminary escrow of assets of virtually unlimited duration against almost any American business. The Court of Appeals' finding of an implied remedy in a suit brought pursuant to §13(b) of the FTC Act deserves review by this Court.

III. THE INJUNCTION LACKS SPECIFICITY.

The district court, in a brief paragraph at the end of its opinion, entered an injunction prohibiting the defendants from "making misrepresentations and failing to disclose material facts . . . concerning investment potential and suitability of land. . . . " The district court did not define what was meant by "misrepresentations" or "material facts." This injunction violates F.R. Civ. P. 65 and is contrary to this Court's decision in *Schmidt v. Lessard,* 414 U.S. 473 (1974).

The specificity demanded in F.R. Civ. P. 65 is no mere technical requirement. *Schmidt v. Lessard,* 414 U.S. 473, 476 (1974); *Granny Goose Foods, Inc. v. Teamsters,* 415 U.S. 423, 444 (1974); *Int'l Longshoremen's Ass'n. v. Philadelphia Marine Trade Ass'n.,* 389 U.S. 64, 76 (1967). Due process requires that a defendant be on notice as to what he can and cannot do. This is particularly true where an injunction imposes a prior restraint on constitutionally protected commercial speech. *Organization For a Better Austin v. Keefe,* 402 U.S. 415 (1971). Because only some forms of commercial speech can be restricted, an injunction must precisely distinguish between unprotected and protected speech, to avoid restraining the latter.

The Court of Appeals reasoned that there was "little danger that appellees [petitioners here] will misapprehend

what misrepresentations and omissions are prescribed . . ." 665 F.2d at 723, because other portions of the district court's opinion describe *some* of the alleged misrepresentations and omitted material facts. The Court of Appeals failed to appreciate the limitless scope of the injunction.

The unspecified prohibitions in the present injunction are especially troublesome given the extremely broad and flexible definitions ascribed by the FTC to "misrepresentation" and "material fact." A misrepresentation is any statement, even if true, which might have the tendency to mislead "the ignorant, the unthinking, and the credulous." *Charles of the Ritz Distribs. Corp. v. Federal Trade Commission,* 143 F.2d 676 (2d Cir. 1944). A material fact is any fact which the FTC believes might be important to an ignorant, unthinking, or credulous consumer. *J.B. Williams Co. v. Federal Trade Commission,* 381 F.2d 884 (6th Cir. 1967). The threat of severe penalties for the violation of such a vague injunction makes any contact with a prospective customer a perilous venture, and will chill the defendants in the exercise of their first amendment right to engage in nondeceptive commercial speech.

The courts of appeals have ruled invalid injunctive decrees containing language similar to the present injunction. *Universal Amusement Co.,* 587 F.2d 159, 167 (5th Cir. 1978), *aff'd.,* 445 U.S. 308 (1980) ("obscene"); *B. H. Bunn Co.* v. *AAA Replacement Parts Co.,* 451 F.2d 1254, 1268-69 (5th Cir. 1971) ("acts of unfair competition"); *U.S.* v. *Vitasafe Corp.,* 345 F.2d 864 (3rd Cir. 1965) ("false and misleading").

CONCLUSION

For the reasons stated herein, petitioners respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Appendix

No. 80-1793

Fifth Circuit

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant
Cross-Appellee,

v.

SOUTHWEST SUNSITES, INC., *et al.*,
Defendants-Appellees
Cross-Appellants.

Jan. 14, 1982.

Appeals from the United States District Court for the Northern District of Texas.

Before INGRAHAM and TATE, *Circuit Judges**

INGRAHAM, *Circuit Judge:*

This case presents novel questions concerning the scope of the Federal Trade Commission's statutory authorization to seek preliminary injunctive relief from the district courts. Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b) (1976).[1]

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* Due to his death on December 22, 1981, Judge Ainsworth did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

[1] Section 13(b) provides as follows:

Temporary restraining orders; preliminary injunctions

(b) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

(footnote continued)

Pursuant to Section 13(b), the Commission asked the court below for an order escrowing certain assets of the appellees and other defendants, all of whom were targets of an investigation into land sales in Southwest Texas, and other relief including compulsory notification to consumers who had purchased land from appellees and were continuing to make payments under their contracts. After referral to a magistrate for an evidentiary hearing, the district court preliminarily enjoined appellees from future misrepresentations and omissions in connection with these sales of land in question, but declined to order the ancillary relief requested by the Commission in the belief that Section 13(b) did not authorize such relief. We affirm the order enjoining further violations of the Federal Trade Commission Act, but reverse on the issue of ancillary relief and remand for further consideration of the appropriateness of the Commission's request.

(footnote continues)

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further,* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

Although the lower court in *Federal Trade Commission v. British Oxygen Co.*, 529 F.2d 196 (3d Cir. 1976), ordered relief under 13(b) similar to that sought by the Commission here, the Third Circuit vacated the order and stated that it was unnecessary to reach the question of the proper scope of Section 13(b) relief. 529 F.2d at 199. Accordingly, the scope of Section 13(b) preliminary relief appears to be a question of first impression in this circuit and elsewhere.

I. *Factual Background*

The Commission initiated its investigation of appellee Southwest Sunsites, Inc. in late 1973, shortly after the corporation began selling undeveloped land in Culberson and Jeff Davis Counties, located in Southwest Texas. This investigation later expanded to include appellees Green Valley Acres, Inc., and Green Valley Acres, Inc., II. All these companies are Texas corporations, operated by two principal individuals, Sidney Gross and Edwin Kritzler.[2] Defendant Porter Realty, a real estate broker which sold approximately sixty per cent of the land in question, was not made subject to the preliminary injunction and is therefore not before us on this appeal.

The findings of the magistrate, as adopted by the district court, show that Culberson and Jeff Davis Counties are sparsely populated, and the climate is generally described as semi-arid to arid. The approximate rainfall is eight to nine inches per year. Appellees acquired large tracts of essentially barren land in this area, subdivided the land and offered it for sale in parcels of between five and forty acres, for approximately $600 to $700 per acre. Among other representations, appellees' main sales claims were that the property had good potential for homesites, farming, ranching and for commercial purposes, that water and utilities were readily accessible to the property, and that the area surrounding the properties was growing and developing.

Contrary to these representations, it appears that portions of the properties are not located above available ground water, and that where ground water is available it is between 325 to 800 feet below the surface. A well to provide water for a family of four on a five acre tract would cost in excess of $6000. Similarly, most of the property is not near electric or telephone utility lines and installation of such services is estimated at up to $2500. In short, the land sold by appellees has no economically feasible commercial application in the relatively small parcels made available, and parcels of this size have no resale value.

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[2] The Commission's complaint as to individual defendants was dismissed for lack of personal jurisdiction. This ruling was not appealed.

The vast majority of purchasers entered into purchase contracts without viewing the property. A majority of the purchasers were not residents of the State of Texas, and had been solicited through extensive nationwide advertising and sales efforts. Under the purchase contracts purchasers were permitted to pay principal plus interest over periods of time up to one hundred and twenty months. Title to the property would not transfer to the purchaser until the full price was paid, and failure to make a payment would subject a purchaser to cancellation of the contract and forfeiture of all monies already paid. According to appellees' records the total balance of outstanding accounts receivable on purchase contracts as of June 1979 was approximately $10,000,000.

The magistrate and district court concluded that there was substantial evidence appellees had misrepresented the value of the land, and omitted and failed to advise purchasers of facts such as the expenditures required for water and utilities, the unfeasibility of farming and ranching on the small tracts made available, and the fact that photographs used in Southwest Sunsites' sales materials were not representative of the land as a whole. On the basis of these and other findings the district court concluded that the Commission had sufficiently established the probability that the defendants had engaged in acts and practices in violation of Section 5 of the Federal Trade Commission Act,[3] that the Commission demonstrated a likeli-

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[3] Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976), provides in part as follows:

(a)(1) unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * * * * *

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of

(footnote continued)

hood of success on the merits in an administrative proceeding against defendants, and that it would be in the public interest to maintain the status quo during pendency of the administrative proceeding under Section 5.

Accordingly, the district court ordered the appellees to cease and desist from making misrepresentations and failing to disclose material facts concerning the investment potential and suitability of appellees' land for homesites or commercial purposes. The court declined, however, to order ancillary relief

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(footnote continues)

shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

as requested by the Commission. Pointing to the transfer of funds from the corporate defendants to the various individuals controlling these corporations, the Commission had sought an escrow of present and incoming assets to preserve the possibility of an action for consumer redress under Section 19 of the Federal Trade Commission Act.[4] Both the magistrate and the district court concluded that such a "freeze" order was not authorized by Section 13(b). The magistrate did recommend that the appellees be required to notify purchasers of the ongoing proceedings before collecting any further payments; however, this relief was also denied by the district court.

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[4] Section 19 of the Federal Trade Commission Act provides as follows:

(a)(1) If any person, partnership, or corporation violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 45(a) of this title), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) of this section in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 45(a) of this title) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b) of this section.

Nature of relief available

(b) The court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

15 U.S.C.A. § 57b (Supp. 1981).

II. *Discussion*

The Commission raises the following issues on appeal: whether the district court erred in concluding that Section 13(b) of the Federal Trade Commission Act did not permit the court to order ancillary relief in the form of an escrow of corporate assets, and compulsory notification of affected consumers; and whether the requested injunctive relief should have been granted in light of the district court's findings that the defendants had engaged in unfair and deceptive acts and practices. On cross-appeal, appellees attack the injunction as issued, contending that there was no evidence of continuing or future violations of the Federal Trade Commission Act that would justify an injunction and that the injunction order improperly requires reference to the magistrate's recommendations in order to ascertain the acts and practices enjoined.

A. *The Scope of Preliminary Relief under Section 13.*

In its complaint the Commission requested an injunction preventing future misrepresentations and omissions, and ordering the defendants to do the following: place and maintain in an escrow account, subject to the court's control, all payments to be received under land purchase contracts; make all tax, mortgage and other payments necessary to protect the purchasers' interests in the land; refrain from cancelling any contracts for a purchaser's failure to meet any obligations under the contract; and refrain from transferring, selling, assigning or in any way encumbering the land, sales contracts or other assets of the corporate defendants without specific approval of the district court. The complaint also sought to enjoin the brokers, Porter Realty and Irvin Porter, from receiving further commissions or residual commissions during the pendency of the action. In its brief to this court the Commission explains that this relief is necessary in light of the significant threat of dissipation of corporate assets: the corporations are closely held and pay the individuals involved large loan repayments and a substantial percentage of incoming payments as fixed commissions or "overrides;" and both the corporations and the individuals face a number of other legal actions. Implicit in the

Commission's requests is the future availability of an action for consumer redress, including refunds, under Section 19 of the Federal Trade Commission Act. With Section 19 in mind, the Commission argues, the requested relief is within a district court's inherent equitable jurisdiction to preserve the possibility of complete and effective relief at the conclusion of the process of adjudication on the merits. The magistrate and district court concluded that, from a plain reading of Section 13(b), the Commission may seek only that preliminary relief necessary to restrain alleged unfair practices, pending a Section 5 administrative proceeding. In this view, the scope of preliminary relief is limited to the relief which may be ordered by the Commission itself under Section 5. The ancillary relief sought here, the district court stated, could not be characterized as "merely enjoining the improper act or practice found likely to occur." Both the magistrate and district court considered the possibility of an eventual Section 19 consumer redress proceeding to be an attenuated and inadequate justification for preliminary relief.

While the grant or denial of a preliminary injunction is generally left to the discretion of the district court and will not be disturbed absent an abuse of that discretion, *Foley* v. *Alabama State Bar,* 648 F.2d 355, 358 (5th Cir. 1981), denial based upon an erroneous legal premise is reviewable as is any conclusion of law. *Douglas* v. *Beneficial Finance Co. of Anchorage,* 469 F.2d 453, 454 (9th Cir. 1972). We believe the district court adopted an unduly narrow view of its powers and responsibilities under the Act and will remand for further consideration of the requested relief under the principles discussed here.

By authorizing the Federal Trade Commission to petition a district court for preliminary injunctive relief, Section 13(b) "posts a clear entrance sign for FTC provisional relief applications." *Federal Trade Commission* v. *Weyerhaeuser Co.,* 1981-2 Trade Cas. (CCH) ¶ 64,263 at 74,123 ____ F.2d ____ (D.C. Cir. Sept. 1, 1981). Although the plain language of the statute speaks only of enjoining an allegedly unlawful act of practice, virtually identical statutes permitting other agencies to seek preliminary injunctions have been interpreted as invoking

the full equitable jurisdiction of the district court. *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960) (Section 17 of the Fair Labor Standards Act; jurisdiction granted "to restrain violations" of the Act); *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) (Section 205(a) of Emergency Price Control Act of 1942; application for order enjoining violations of the Act); *Interstate Commerce Commission v. B & T Transportation Co.*, 613 F.2d 1182 (1st Cir. 1980) (Section 322(b)(1) of Motor Carrier Act; jurisdiction to restrain "further violation"). *See also Securities and Exchange Commission v. First Financial Group of Texas*, 645 F.2d 429 (5th Cir. 1981); *United States v. Coca Cola Bottling Co. of Los Angeles*, 575 F.2d 222 (9th Cir.), *cert. denied* 439 U.S. 959, 99 S.Ct. 362, 58 L.Ed.2d 351 (1978). *Commodity Futures Trading Comm'n v. Muller*, 570 F.2d 1296 (5th Cir. 1978). These cases make indisputably clear that a grant of jurisdiction such as that contained in Section 13(b) carries with it the authorization for the district court to exercise the full range of equitable remedies traditionally available to it. The doctrine is summarized in the following often quoted discussion in *Porter*:

> Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. *Virginia R. Co. v. System Federation*, 300 U.S. 515, 552 [57 S.Ct. 592, 601, 81 L.Ed. 789]. Power is thereby resident in the District Court, in exercising this jurisdiction, "to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 [64 S.Ct. 587, 591, 88 L.Ed. 754]. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court

so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decided whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. *Camp v. Boyd,* 229 U.S. 530, 551-552 [33 S.Ct. 785, 793, 57 L.Ed. 1317].

> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

328 U.S. at 397-98, 66 S.Ct. at 1088-1089. The Supreme Court's reaffirmation of this principle in *DeMario* contained this further explanation:

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.' *Clark v. Smith,* 13 Pet. 195, 203 [10 L.Ed. 123].

361 U.S. at 291-92, 80 S.Ct. at 334-335. In the exercise of this inherent equitable jurisdiction the district court may order temporary, ancillary relief preventing dissipation of assets or funds that may constitute part of the relief eventually ordered in the case. *Securities and Exchange Commission v. First Financial Group of Texas,* 645 F.2d 429 (5th Cir. 1981) (appointment of receiver); *Commodity Futures Trading Commission v. Muller,* 570 F.2d 1296 (5th Cir. 1978) ("freeze" of defendant's assets); *Securities and Exchange Commission v. Manor Nursing Center,* 458 F.2d 1082 (2d Cir. 1972) (freeze of assets pending

transfer to trustee). As this court found in *Muller,* such an order may be required "to preserve the status quo so that an ultimate decision for the Commission may be effective." 570 F.2d at 1300 (citations omitted).

The holdings of these cases are directly applicable to this case. Section 13(b) contains no express limitations on the otherwise full powers of the district court to mold appropriate decrees under its traditional equitable jurisdiction, and we decline to tie the hands of the district court without such express limitation. A similar conclusion was recently reached by the D.C. Circuit in its holding that Section 13(b) authorized the district court to order an acquiring company to hold separate a portion of the assets acquired through a merger. *Federal Trade Commission v. Weyerhaeuser Co.,* ____ F.2d ____ (D.C.Cir.1981). The D.C. Circuit reviewed the legislative history and purposes of Section 13(b) and concluded that Congress intended this section to be used flexibly and with reference to "the historic injunctive process," citing *Hecht Co. v. Bowles,* 321 U.S. 321, 329, 64 S.Ct. 587, 591, 88 L.Ed. 752 (1944).

We also believe that the exhortation in *DeMario* to preserve the possibility of complete relief, which merely restates the purpose of preliminary injunctions in general, *see Developments in the Law—Injunctions,* 78 Harv.L.Rev. 994, 1096 (1965), makes it appropriate to consider that the final, complete relief in this case may entail consumer redress through a Section 19 proceeding. Simply because the complete resolution of a matter will require a two-step process does not relieve a court of the task of determining how to preserve a state of affairs such that a meaningful decision can be rendered after full consideration of the merits. Indeed, although it may seem unusual at first to seek preliminary relief with reference to a separate action, it has long been considered within a court's equitable jurisdiction to issue an injunction preserving property pending a subsequent determination in another forum of the rights of parties in the property. *See Arrow Transportation Co. V. Southern Railway Co.,* 372 U.S. 658, 679, 83 S.Ct. 984, 995, 10 L.Ed.2d 52 (1963) (Clark, J., dissenting); *Erhardt v. Boaro,* 113 U.S. 537, 5 S.Ct. 565, 28 L.Ed. 1116 (1885).

We observe also that several commentators have characterized a consumer redress action as a continuous two-phase process, the first phase being administrative adjudication, and the second judicial determination of appropriate redress. II S. Kanwit, Federal Trade Commission § 21.05 (1980); Kintner & Westermeier, *Obtaining Refunds for Consumers Under Section 19 of the FTC Act,* 29 Syracuse L.Rev. 1025, 1034-36 (1978). Such a characterization, which strikes us as a reasonable one, makes even more apparent the propriety of framing preliminary relief with the entire process in mind.

These conclusions are entirely consistent with the legislative history of both Sections 13(b) and 19. Section 13(b) was introduced by Senator Jackson as a floor amendment to S. 1081, the Federal Lands Right-of-Way Act, and became Section 408(f) of the Trans-Alaska Pipeline Authorization Act, Pub.L. No. 93-153, 15 U.S.C. § 53(b) (1976). Senator Jackson stated that the proposed new Commission authority, of which Section 13(b) was one of several provisions, was "designed to enable the Commission to carry out its mandate to protect the public interest through a prompt and aggressive enforcement of the laws it administers." 119 Cong.Rec. 22979 (July 10, 1973). *See also* Sections 408(a)(1), and (b), Pub.L. No. 93-153, 87 Stat. 591. Although the preliminary relief provisions were intended to apply to both deceptive practices and anti-competitive conduct cases, as indicated by the express application of Section 13(b) to "any provision of law enforced by the FTC," most of the discussion in the House concerned the need for preliminary relief in anti-competitive-merger cases. Nevertheless this discussion is revealing; Representative Smith noted that substantial public injury can take place during the pendency of a Commission proceeding, and that "without injunctive powers the Federal Trade Commission frequently is left with having to impose remedies that are conspicuously inadequate . . . . The Commission may rule the conduct illegal but during this operation the patient may die. . . . Without this injunction power consumers have no protection at all during the pendency of the suit. . . . It is only good sense that where there is a probability that the act will eventually be found illegal and the perpetrator ordered to cease, that some

method be available to protect innocent third parties while the litigation winds its way through final decision." 119 Cong.Rec. 36608-9 (Nov. 12, 1973). The conference report did not specifically address the scope of 13(b) relief.

Approximately one year later, Congress passed the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub.L. No. 93-637, Stat. 2183. Section 206, Consumer Redress, added the new Section 19 of the Federal Trade Commission Act. This legislation was explicitly intended to improve the Commission's consumer protection powers. See S.Conf.Rep. 93-1408, 93d Cong. 2d Sess. 1 (1974), [1974] U.S. Code Cong. & Admin. News, 7702, 7755. Significantly, Representative Eckhardt, quoting an administration spokesman, urged that consumer fraud be rendered "pursuable, punishable, and profitless." 120 Cong. Rec. 31735 (Sept. 19, 1974). The evident intent of these 1975 amendments was to add significant new weapons to the Commission's enforcement arsenal in order to make more meaningful and complete consumer relief possible. It seems to us that not only is the use of preliminary relief a desirable and effective method of implementing consumer redress under Section 19, but that precluding such preliminary relief could entirely prevent the effectuation of Section 19 in circumstances such as those alleged by the Commission in this case.

We believe that through these various recent amendments to the Federal Trade Commission Act, "Congress was evolving a statutory plan for the protection of the . . . public." *Securities and Exchange Commission v. Keller Corp.*, 323 F.2d 397, 403 (7th Cir. 1963). The Act clearly makes the district court a vital "enforcement arm" of the statute. *Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 19-20, 94 S.Ct. 1028, 1038, 39 L.Ed.2d 123 (1974). The type of ancillary relief sought by the Commission in this case appears to be well within the jurisdiction of the district court under Section 13(b), in order to preserve the status quo pendente lite and assure the possibility of complete relief following administrative adjudication.

Appellees raise two principal objections to the application of the inherent equitable jurisdiction doctrine to this case.[5] First, appellees argue that all the cases involving agencies other than the Federal Trade Commission are inapplicable because those other agencies all bring their enforcement actions directly in federal district court, where the court has continuing supervision over the litigation. In contrast, the Commission does not rely on the district courts for this purpose but rather conducts its own administrative hearings, over which the district court that issues preliminary relief has no control. We reject this attempted distinction. As the Commission points out, appellees' argument would prevent the issuance of any preliminary injunction sought by the Commission, despite Section 13(b), on the ground that the administrative proceedings were likely to be protracted. As we observed at the outset of this discussion, the relevant statutory language in Section 13(b) is virtually identical to the language of other legislation that has been found to invoke the district court's general equitable jurisdiction. Appellees' arguments in this context do not suggest the "clear and valid legislative command, . . . or necessary and inescapable inference" required by *Porter* to negate the comprehensiveness of the Court's equitable jurisdiction. 328 U.S. at 398, 66 S.Ct.

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[5] Two of appellees' arguments may be summarily disposed of. In support of its argument that Section 13(b) is not intended to grant the type of preliminary relief requested by the Commission in this case, appellees point to the failure of subsequent bills introduced in Congress to specifically grant the Commission the power in dispute in this case. As the Commission points out, however, it is not improper for an agency to seek explicit authorization for powers thought to be somewhat controversial, and any number of reasons for the failure of this subsequent legislation are possible. Courts typically refrain from drawing conclusions from subsequent legislative history for precisely these reasons. *See Federal Trade Commission v. Dean Food Co.*, 384 U.S. 597, 609, 86 S.Ct. 1738, 1745, 16 L.Ed.2d 802 (1966); *United States v. Philadelphia National Bank*, 374 U.S. 321, 348-49, 83 S.Ct. 1715, 1733, 10 L.Ed.2d 915 (1962).

At oral argument, counsel for appellees also suggested that a due process violation would result if the Commission determined, prior to the Section 5 administrative hearing, that it would also seek consumer redress under Section 19. *But cf. Withrow v. Larkin*, 421 U.S. 35, 46-59, 95 S.Ct. 1456, 1463-1470, 43 LEd.2d 712 (1975). This contention was not addressed in the briefs, however, and now comes too late. *See Harris v. Plastics Mfg. Co.*, 617 F.2d 438, 440 (5th Cir. 1980).

at 1089. We also note that lack of continuing supervisory control over the administrative proceeding did not concern the Supreme Court when it authorized the Commission to seek preliminary relief under the All Writs Act, 28 U.S.C. § 1651(a) (1976), to enjoin a merger pending administrative proceedings. *Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597, 604, 86 S.Ct. 1738, 1742, 16 L.Ed.2d 802 (1966). While we have no indication here that the Commission's administrative proceedings will be unduly protracted, if such facts do arise, it remains within the discretion of the district court to tailor any preliminary injunction to minimize the harm to appellees' legitimate business activities, or to condition the granting of the injunction on adoption of an expedited hearing schedule. *See Federal Trade Commission v. British Oxygen*, (CCH) 1974 Trade Cas. ¶ 75,003 (D.Del.1974), *vacated, Federal Trade Commission v. British Oxygen*, 529 F.2d 196 (3d Cir. 1976).

Appellees' second argument is that any order of preliminary relief under Section 13(b), by the terms of the statute, has limited duration and only lasts "pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final. . . ." 15 U.S.C. § 53(b)(2) (1976). An order of the Commission becomes final upon the exhaustion of available review procedures, or expiration of time to seek such review. 15 U.S.C. § 45(g) (1976). Because of this limited duration, appellees argue, the preliminary injunctive relief section could not have been intended to be used in conjunction with Section 19, which comes into play only after a final cease and desist order. 15 U.S.C. § 57b(a)(2) (1976). While we agree with appellees' reading of the limited duration of a Section 13(b) preliminary order, this presumably signifies only that once the Commission has issued a cease and desist order it must then apply to whatever district court will consider a Section 19 proceeding for further relief. The limited question facing a district court in these circumstances is whether, in light of the showing of likelihood of success, injunctive relief to preserve the status quo *at this time* is in the public interest.

We conclude that the doctrine of inherent equitable jurisdiction is fully applicable where, as here, "Congress has utilized . . . the broad equitable jurisdiction that inheres in courts and where the proposed exercise of that jurisdiction is consistent with the statutory language and policy, the legislative background and the public interest." *Porter,* 328 U.S. at 403, 66 S.Ct. at 1091.[6]

In its opinion the district court cited *Federal Trade Commission v. Turner,* 609 F.2d 743 (5th Cir. 1980), in the apparent belief that while the Commission acts in the public interest when proceeding under Section 13(b), this public interest role does not carry over to a Section 19 proceeding, which is brought to redress private injuries. *Turner,* however, concerned the power of the Commission itself to issue subpoenas in aid of its Section 19 authority. Therefore we do not feel that case controls the question presented here, regarding the inherent equitable jurisdiction of the district court and the exercise of that jurisdiction under the statutory scheme of the Federal Trade Commission Act.

Because of our resolution of this issue we need not address the possible use of the All Writs Act, or the question of the Commission's own power to order consumer redress in a Section 5 cease and desist order.

B. *The Standard for Issuing Ancillary Relief.*

In its discussion of the ancillary relief requested, the district court stated:

> Assuming, *arguendo,* that such an order is authorized under section 13, a court would be loathe to issue such an injunction in the absence of a strong showing of dissipation of assets. Under the evidence before me, I do not believe that this case warrants this drastic and unprecedented relief.

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[6] The parties also contest the admissibility of various items of evidence produced by the Commission. Any such challenges not yet waived can be considered on remand.

Appellees contend that this statement was a finding of fact that precludes availability of the requested injunctive relief unless shown to be clearly erroneous. Whether or not this statement is intended to be a finding of fact, it is clear that the district court was applying a standard requiring a "strong showing" of the need for the particular relief requested. This standard appears to be excessively harsh, and on remand the district should reexamine the evidence and determine whether the requested relief is "reasonably necessary" in order to preserve the possibility of complete and meaningful relief at the conclusion of litigation. *See Commodity Futures Trading v. Muller,* 570 F.2d at 1296, 1301 (5th Cir. 1978); *cf. United States v. Coca-Cola Bottling Co. of L. A.,* 575 F.2d 222, 231 (9th Cir.), *cert. denied,* 439 U.S. 959, 99 S.Ct. 362, 58 L.Ed.2d 351 (1978) ("reasonable probability" that merger would be anticompetitive). In view of the Commission's indications that any consumer redress sought in this case would be through Section 19 and not other mechanisms, the district court should additionally inquire as to the likelihood of the Commission's success on the question whether the acts and practices under scrutiny are ones that "a reasonable man would have known under the circumstances [were] dishonest or fraudulent." Section 19(a)(2), 15 U.S.C.A. § 57b(a)(2) (Supp.1981).

C. *Compulsory Notification.*

Although the Commission's complaint did not specifically mention compulsory notification to purchasers of the ongoing proceedings, the complaint did allege that the defendants were continuing to misrepresent and failing to disclose material facts to purchasers and sought an order compelling defendants to cease and desist such acts. The magistrate recommended that the defendants be enjoined from receiving and depositing further payments pursuant to purchase contracts until the purchasers are advised of the possibility of such misrepresentations and omissions. The district court rejected this recommendation, stating "A notification order suffers from the same defects as does creation of escrow accounts; each is solely referrable to past alleged violations."

Once again we believe the district court took an unduly narrow view of its available jurisdiction under Section 13(b). In a suit for permanent injunction under Section 13(b), the court in *Federal Trade Commission v. Virginia Homes Mfg. Corp.*, 509 F.Supp. 51, 55 (D.Md.1981), *aff'd, Federal Trade Commission v. Virginia Homes Mfg. Corp.*, No. 81-1187 (4th Cir., July 14, 1981) (unpublished), held that "compulsory notice is implicitly authorized by section 13(b) so long as such notice would be essential to the effective discharge of the court's responsibilities." *See also Federal Trade Comm. v. Travel King, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,419 (W.D.Wash.1974). Because of our holding above that Section 13(b) invokes the inherent equitable jurisdiction of the district courts, we remand to allow the district court to reconsider whether notification to consumers is called for in this case. As in *Virginia Homes*, it is conceivable that consumers could be prevented from properly asserting their possible legal rights absent notification notification of possible misrepresentations. We note that the case for notification was much more compelling in *Virginia Homes*, however; there, holders of warranties that were found to violate federal law in various respects would be unaware of their newer more expansive warranty rights absent the notification. 509 F.Supp. at 56. *See also FTC v. Travel-King, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,419 (W.D.Wash.1974) (notification regarding "psychic surgery" claims). Accordingly, in the exercise of its discretion the district court may conclude that the rights of purchasers would be adequately protected by other preliminary relief.

III. *The Cross-Appeal*

Appellees argue that there was no showing of any continuing or future violations of the Act that would justify the district court's injunction prohibiting further misrepresentations and omissions in connection with the sale of land. Appellees point to the magistrate's finding that there is no promotional or sales campaign presently carried on by appellees. This same finding, however, states that sales on-site are continuing; the magistrate's findings generally suggest that the appellees' business operations are still in place.

The district court acted well within its discretion in ordering appellees to cease and desist from further violations of the Act. This is particularly true when the evidence developed to date suggests a large-scale systematic scheme tainted by fraudulent and deceptive practices, giving rise to a "fair inference of a reasonable expectation of continued violations" absent restraint. *Securities and Exchange Commission v. Manor Nursing Center, Inc.*, 458 F.2d 1082, 1100-01 (2d Cir. 1972).

Appellees' final attack on the injunction issued is that the terms of the injunction fail to comply with the requirement of specificity in Fed.R.Civ.P. 65 in two respects: the use of "catchall" phrases such as "misrepresentation" and "disclosure of material facts" is impermissibly vague; and the provisions of the court's order that adopt or refer to the magistrate's report violate Rule 65(d)'s prohibition of reference to other documents.

In its order, the district court reviews the magistrate's report adopting particular findings and modifying others and concludes by ordering appellees to "cease and desist from making misrepresentations and failing to disclose material facts to purchasers and prospective purchasers concerning investment potential and suitability of land in [appellees' subdivisions] regarding usability as homesites, farms, ranches or for commercial purchases." We find nothing impermissibly vague about the use of the terms "misrepresentation" and "failure to disclose material facts" in the context of the district court's order, particularly because the order does expressly describe the difficulty in obtaining utility services for the property and the economic unfeasibility of the land for farming, ranching or commercial purposes in the small parcels made available. There seems to be little danger that appellees will misapprehend what misrepresentations and omissions are prescribed, or that appellees will be liable to contempt citations for activities not contemplated by this order.

However, several of the magistrate's findings adopted by reference deal with specific acts and practices the magistrate and the district court consider to be material misrepresentations

and omissions; for example, finding 23 regarding misrepresentation of the potential appreciation in value, and findings 24(b) and (c) concerning the failure to advise purchasers of the substantial sums of money required to make the land suitable for housing or farming. Incorporation of such findings by reference violates the prohibition in Rule 65(d) of "reference to the complaint or other document." This no-reference requirement has been strictly construed in this circuit. *See Meltzer v. Board of Public Instruction of Orange County, Florida,* 480 F.2d 552, 554 (5th Cir. 1973) (provision of order referring to court's prior order violates Rule 65(d)); *B. H. Bunn Co. v. AAA Replacement Parts Co.,* 451 F.2d 1254, 1269 (5th Cir. 1971) (reference back to findings of fact may be insufficient to advise parties of permissible and prohibitive conduct). Accordingly, on remand the district court should explicate its references to the magistrate's order. The Commission protests that correction of this defect calls for the purely mechanical exercise of typing in the specific parts of the magistrate's report where indicated. This may indeed seem overly technical, but it would allow the parties to interpret the injunction "from the four corners of the order" as required by Rule 65(d). *Sanders v. Airline Pilots Ass'n International,* 473 F.2d 244, 247 (2d Cir. 1972).

IV. *Conclusion*

In summary, we remand for the district court to revaluate its denial of the Commission's requested preliminary injunctive relief in light of our discussion of the availability of such measures under Section 13(b) of the Federal Trade Commission Act. We affirm the injunction issued by the district court insofar as it enjoins further violations of the Act, and direct that the district court amplify its references to the magistrate's report.

AFFIRMED in part; REVERSED and REMANDED in part.

Civil Action No. CA 3-80-0258-F

IN THE
United States District Court
For The Northern District of Texas
Dallas Division

FEDERAL TRADE COMMISSION

VS.

SOUTHWEST SUNSITES, INC., *et al.*

ORDER
(Filed May 18, 1980)

Plaintiff filed its application for preliminary injunction against Defendants' alleged unfair trade practices in the sale of undeveloped land in West Texas. Section 13(b) of the FTC Act authorizes the district court to issue a preliminary injunction against violations of the Act, "upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest . . . " 15 U.S.C. § 53(b).

Under authority of 28 U.S.C. § 636(b), the United States Magistrate heard evidence and issued his findings, conclusions and recommendation to this Court. All parties have filed objections to the Magistrate's determinations. The Court has independently reviewed the entire file in this case, as well as the transcript of the hearing and exhibits presented before the Magistrate, to make the following orders:

1. The FTC possesses authority now and at all times during this proceeding to bring this section 13(b) action. Consequently, the motion to dismiss filed by Defendants Porter Realty and Irvin Porter claiming contravention of 31 U.S. § 665(a) is denied.

2. The Court finds correct and hereby adopts the Magistrate's conclusion that the FTC failed to establish sufficient contacts of the individual defendants Edwin Kirtzler, Sydney Gross and Irvin Porter to render them amenable to service of process, or that the corporate defendant was the alter ego of the individual defendants.

3. The Court finds correct and adopts as its own the Magistrate's findings of fact numbered 1-9, inclusive.

4. The Court finds correct and adopts as its own the Magistrate's finding of fact numbered 10, and adds the following:

The evidence did not establish that Porter Realty is now engaging in or is about to engage in any sales or resales of the land or that Porter Realty is now making or is about to make any misrepresentations in communications with customers who purchased land from SWS, GVA, or GVAII.

5. The Court finds correct and adopts as its own the Magistrate's findings of fact numbered 11 and 12.

6. The Court modifies the Magistrate's finding of fact numbered 13 as follows:

At various times from 1973 to January 1980, SWS, its agents and employees represented that there was a lodge on the property of SWS and that a golf course had been completed.

7. The Court modifies the Magistrate's finding of fact numbered 14 as follows:

SWS, GVA, and GVAII represented through radio and television advertising campaigns, promotional literature and through their agents and employees that the properties had a good potential for homesites, farming, ranching and for commercial purposes, that water and utilities were readily accessible to the individual five-, ten-, and twenty-acre tracts, and that the area surrounding the properties was growing and developing.

8. The Court finds correct and adopts as its own the Magistrate's findings of fact numbered 15 and 16.

9. Most of the individual five- to forty-acre tracts located on SWS, GVA, and GVAII are not located near electric or telephone utility service lines. Electrical and telephone utilities are not provided by SWS, GVA or GVAII. Installation costs for electric and telephone service to the sites for individual purchasers could be up to $2,500 for each.

10. The Court finds correct and adopts as its own the Magistrate's findings of fact numbered 18 and 19.

11. The Court modifies the Magistrate's finding of fact numbered 20 as follows:

During the relevant periods of time from 1973 through June 1979, SWS, GVA and GVAII, Porter Realty, Inc., its agents and employees sold parcels of the property to purchasers at a cost of approximately $600 to $700 per acre. The majority of persons contacted and who entered into purchase contracts with SWS, GVA and GVAII were not residents of the State of Texas. The vast majority of all purchasers entered into the sales purchase contract (see FTC Exhibit Nos. 74, 75, 76, 77 and 78) without seeing the properties or the specific parcel that they agreed to purchase. During the period of time that Porter Realty, Inc. was engaged in the sale of properties for SWS, GVA and GVAII (FTC Exhibit No. 37a-c) and continuing thereafter until on or about June 1979, Porter Realty negotiated resales of parcels (see Affidavit of Irvin Porter executed April 10, 1980). Up until a few months ago, SWS, GVA and GVAII made sales of the property in the South Pacific.

12. The Court modifies the Magistrate's finding of fact numbered 21 as follows:

The land sales purchase contracts obtained by SWS, GVA GVAII, its agents and employees and by Porter Realty, Inc., and its agents and employees permitted purchasers to pay principal plus interest over periods of time up to 120 months (see, e.g., FTC Exhibit No. 173f-g). Under the terms of such contracts title to tracts sold to purchasers would not be transferred to the purchaser until the full price had been paid. Under the terms of such contracts, the purchaser's failure to

make payment as required would subject him to cancellation of any interest in the tract of land and forfeiture of all monies paid in.

13. The Court finds correct and adopts as its own the Magistrate's findings of fact numbered 22 and 23.

14. The Court modifies the Magistrate's finding of fact numbered 24 as follows at paragraphs "a" and "d":

(a) that the photographs contained in the brochure for SWS, GVA and GVAII taken on the Sunsites' properties portrayed small areas of the entire properties and that such pictures were not representative of the appearance of the SWS properties as a whole.

(d) that the farming of crops on acreage less than 160-230 acres or ranching on acreage less than twenty sections was and would be economically unfeasible.

15. The Court finds correct and adopts as its own the Magistrate's findings of fact numbered 25 through 34, inclusive.

16. The Court finds that the evidence presented by the FTC is sufficient to show the likelihood that Defendants SWS, GVA and GVAII are violating or are about to violate acts and practice violative of section 5 of the Act.

17. The Court does not find from the evidence presented by the FTC the likelihood that Defendant Porter Realty is violating or is about to violate section 5 of the Act.

18. The Court modifies the Magistrate's finding of fact numbered 35 as follows:

The Court finds that the evidence adduced by the Plaintiff FTC as to Defendants SWS, GVA and GVAII that it would be in the public interest to maintain the status quo during the pendency of the administrative proceeding under section 5.

19. The Court finds correct and adopts as its own the Magistrate's conclusions of law numbered 1-8, inclusive.

20. The Court modifies the Magistrate's conclusion of law numbered 9 as follows:

Under the statutes and caselaw pursuant to sections 5 and 13(b) of the Act, it is in the public interest to preliminarily enjoin Defendants SWS, GVA and GVAII from further misrepresenting or failing to disclose material facts concerning the investment potential and suitability of the land for use as homesites, farms, ranches or for commercial purposes. Evidence is present from which the Court concludes that Defendants SWS, GVA and GVAII are now or are about to engage in practices that are likely to be found unfair or deceptive violations of section 5. These defendants have shown no private equity that would outweigh the significant public equity in favor of preliminarily enjoining such acts or practices. *F.T.C. v. National Tea Co.,* 603 F.2d 694, 697 (8th Cir. 1979).

21. The Court declines to adopt the Magistrate's conclusion of law numbered 10 or his recommendation.

22. The preliminary injunction will issue unaccompanied by any ancillary order. In this regard, I concur in the Magistrate's analysis that establishment of escrow accounts on all future purchaser payments on presently outstanding land sales contracts is improper. Similarly, I decline to grant Plaintiff's application to enjoin SWS, GVA and GVAII from disbursing future purchaser payments or to enjoin further payments for collection of residual commissions due to sales made by Porter Realty, Inc. Rather, I believe that limiting relief to a preliminary injunction running against SWS, GVA and GVAII comports with the FTC's proper position in this section 13(b) proceeding as a "watchdog protecting the general public from unfair trade practices." *F.T.C. v. Turner,* 609 F.2d 743, 745 (5th Cir. 1980). The ancillary relief sought by the Plaintiff cannot be characterized as merely enjoining the improper act or practice found likely to occur but is instead an attempt to preserve assets for availability in a section 19 proceeding, should one be sought. Assuming, *arguendo,* that such an order is authorized under section 13(b), a court would be loath to issue such an injunction in the absence of a strong showing of dissipation of assets. Under the evidence before me, I do not believe that this case warrants this drastic and unprecedented relief.

On like analysis I decline to adopt the recommendation of the Magistrate that a cease and desist order combine with an order enjoining SWS, GVA and GVAII from receiving and depositing monthly installment payments on sales contracts currently in effect until these defendants should notify purchasers of such contracts that possible misrepresentations or omissions may have been made at the time of the contracts' execution. I do not find that the mere collection of payments constitutes an ongoing violation of section 5; consequently, I will not premise a mandatory injunction on a finding that the defendants failed to correct allegedly deceptive or unfair acts or practices made at the time of execution of the contract. A notification order suffers from the same defect as does creation of escrow accounts: each is solely referable to past alleged violations. Of the same cast is a remedy restricting the defendants' use of payments on sales contracts.

Accordingly, it is hereby ORDERED that Defendants SWS, GVA, and GVAII, their officers, agents, servants, and employees and those in active concert or participation with them who receive actual notice of this order by personal service or otherwise, cease and desist from making misrepresentations and failing to disclose material facts to purchasers and prospective purchasers concerning investment potential and suitability of land in Southwest Sunsites, Green Valley Acres and Green Valley Acres II regarding usability as homesites, farms, ranches or for commercial purposes. This order shall remain in effect until the complaint in the section 5 administrative proceeding shall be dismissed or set aside by a court on review or until an order of the Commission made thereon has become final.

So ORDERED this nineteenth day of May, 1980.

/s/ ROBERT W. PORTER
UNITED STATES DISTRICT JUDGE

IN THE

United States District Court
For The Northern District of Texas
Dallas Division

CA3-80-258-F

FEDERAL TRADE COMMISSION

vs.

SOUTHWEST SUNSITES, INC., *et al.*

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

(Filed April 18, 1980)

Pursuant to an Order of Reference entered by the District Court on April 9, 1980, and after having considered the pleadings, the testimony adduced at the evidentiary hearing and the argument and authorities of counsel, the findings, conclusions and recommendation of the Magistrate, as evidenced by his signature thereto, are as follows:

MOTIONS TO DISMISS OF SYDNEY GROSS, EDWIN KRITZLER AND IRVIN PORTER, AS INDIVIDUALS FOR LACK OF IN PERSONAM JURISDICTION:

Prefatory to a consideration of Plaintiff's complaint seeking a preliminary injunction against both the corporate Defendants as well as the individual Defendants, consideration of, and a determination, needs to be made concerning the Motions of the individual Defendants to dismiss the complaint for lack of personal jurisdiction over such individuals.

Necessarily any decision on the individual Defendants' Motions to Dismiss is separate and distinct from a determination as to whether meritorious grounds exist in support of a preliminary injunction against such Defendants. By the same token although the methods and the quality of proof sufficient to establish entitlement to a preliminary injunction under 15 U.S.C. § 53 of the Federal Trade Commission Act may not be synonymous with the burden borne by litigants generally in Federal Court, there is no authority cited by the Plaintiff which would permit this Court to consider the claims of the individual Defendants in a manner other than that traditionally required when a party attacks the jurisdiction over his person.

It is clear that this Court has jurisdiction over the corporate Defendants, to wit: Southwest Sunsites, Inc., Green Valley Acres, Inc., Green Valley Acres, II, and Porter Realty, Inc. In order to establish a prima facie showing of facts which would support jurisdiction over the individual Defendants Plaintiff must establish that the individual Defendants had minimum contacts with the State of Texas sufficient to warrant application of the Texas long-arm statute and that the personal contacts, if any, were not performed on and in behalf of one of the corporate Defendants or that the corporate Defendant was an alter-ego of the individual Defendant justifying piercing of the corporate veil.

With the exception of Edwin Kritzler the Plaintiff has failed to demonstrate any contacts with the State of Texas by the individual Defendants so as to justify exercise of jurisdiction over the individual Defendants. (See Deposition of Ted Allen Rose, Exhibit 4A; attachments to Plaintiff's Memorandum in Opposition to Motion of Defendants Gross and Kritzler to Dismiss and to Quash Service of Process). A nice issue is presented as to whether such hearsay is admissible to establish minimum contacts by the individual Defendant. The thrust of the Plaintiff's position is that the three named individual Defendants formulated and directed the sales and promotional efforts for the properties of the Defendants Southwest Sunsites, Inc., Green Valley Acres, Inc. and Green Valley Acres, II. Assuming, without deciding, that such activities might render

the individual Defendants liable for their actions performed on behalf of the corporate Defendants, the Plaintiff has failed to establish minimum contacts by the individual Defendants which would render them susceptible to process under the Texas long-arm statute. Further, Plaintiff has failed to present evidence sufficient to establish that one or more of the corporate Defendants were alter egos of the individual Defendants. Under such circumstances I am of the opinion that the Motions to Dismiss filed by Sydney Gross, Edwin Kritzler and Irvin Porter individually should be GRANTED.

FINDINGS OF FACT:

1. Plaintiff Federal Trade Commission ("FTC") is an administrative agency of the United States government, established, organized and existing pursuant to the Federal Trade Commission Act ("FTC Act") (15 U.S.C. § 41 *et seq.*).

2. Defendant Southwest Sunsites, Inc. ("SWS") is a Texas corporation with its office and principal place of business located at 16000 Ventura Boulevard, Encino, California 91436.

3. Defendant Green Valley Acres, Inc. ("GVA") is a Texas corporation with its office and principal place of business located at 16000 Ventura Boulevard, Encino, California 91436.

4. Defendant Green Valley Acres, Inc. II ("GVAII") is a Texas corporation with its office and principal place of the business located at 1600 Ventura Boulevard, Encino, California 91436.

5. Defendant Sydney Gross ("Gross") is or has been an officer of one or more of the above corporate Defendants (hereinafter sometimes referred to as "subdividers"). He has formulated, directed, controlled, and participated in the acts and practices of the above corporate Defendants as hereinafter set forth. His address is the same as that of the above corporate Defendants.

6. Defendant Edwin Kritzler ("Kritzler") is or has been an officer of one or more of the above corporate Defendants. He has formulated, directed, controlled, and participated in the

acts and practices of the above corporate Defendants as hereinafter set forth. His address is the same as that of the above corporate Defendants.

7. Defendant Porter Realty, Inc. ("Porter Realty") is a Florida corporation with its office and principal place of business located at 717 Ponce de Leon Boulevard, Coral Gables, Florida 33134.

8. Defendant Irvin Porter ("Porter") is an officer of Porter Realty. He has formulated, directed, controlled, and participated in the acts and practices of Defendant, Porter Realty as hereinafter set forth. His address is the same as that of Porter Realty.

9. Defendant SWS is and has been engaged from 1973 to the present in acquiring, subdividing, offering for sale and selling land to members of the public in several states, including Texas. Defendants GVA and GVAII have been engaged in the aforesaid activities from, respectively, 1976 and 1977 to the present.

10. Defendant Porter Realty was engaged from 1974 to 1978 in the sale of land as agent on behalf of SWS, GVA and GVAII. From 1978 thhough June 1979, Porter Realty, Inc. serviced accounts and resold parcels of land for its customers.

11. As part of the sales solicitation program engaged in by SWS, GVA and GVAII, such corporations through its agents and employees caused newspaper ads to be placed and purchased radio and television commercials in various metropolitan areas throughout the United States. (See FTC Exhibits Nos. 41-70).

12. As part of the sales promotion program to sell five, ten and twenty acre sites on the properties of SWS, GVA and GVAII, Porter Realty Co., its agents and employees used color brochures purporting to contain information on the various properties. (Hearing Exhibits, Plaintiff's Exhibits 6, 7 and 8). In addition, SWS, GVA and GVAII, its agents and employees and Porter Realty, Inc., and its agents and employees provided additional sales and promotional material to prospective purchasers of land and to persons who had already contracted to

purchase sites on the properties of SWS, GVA and GVAII. (See generally FTC Exhibits No. 74-139).

In the course of soliciting sales of sites located on the properties of GVA and GVAII, Porter Realty, Inc., its agents and employees orally represented to prospective purchasers that the properties were over vast quantities of oil, that major oil companies were on the verge of purchasing property within the boundaries of GVA and GVAII for the purpose of oil exploration, that the purpose of property at SWS, GVA and GVAII would constitute a good investment and that purchasers could expect to double their investment within two to two and one-half years from date of purchase.

13. At various times from 1973 to June 1979 SWS, its agents and employees represented that there was a lodge on the property of SWS and that a golf course had been completed.

14. SWS, GVA and GVAII represented through the radio and television advertising campaigns, and through its agents and employees that the properties had a good potential for farming and that water and utilities were readily accessible to the individual five, ten and twenty acre tracts.

The Court further finds:

15. The nearest municipality to the properties of SWS, GVA and GVAII is Van Horn, Texas. From 1973 to the present date Van Horn has experienced a minimal population growth. The economy of Van Horn is stable to depressed. Employment potential is slight for persons moving into the area.

16. Portions of the properties of SWS, GVA and GVAII are located over available ground water. Other portions of the properties are beyond the outer parameters of the ground water sources. Where available the ground water exists between depths of approximately 325 to 800 feet below the surface (See testimony of Stephen T. Holtz; Affidavit of Henry J. Alvarez—FTC Exhibit No. 148). To provide water for a family of four on a five acre tract on the properties of SWS, GVA and GVAII assuming such water to be of potable quality, would

require a 6¼" well to a depth of approximately 400 feet at a cost, including a pump system, in excess of $6000.00. To provide sufficient water for a family of four and to provide sufficient water for irrigation purposes on a five acre tract would require a 12¼" well at a total cost, including an electric pump, in excess of $10,000.00 (See Affidavit of Harland E. Stanton—FTC Exhibit No. 164; cf. Affidavit of John E. Buck—FTC Exhibit No. 173).

17. Most of the individual five to forty acre tracts located on SWS, GVA and GVAII are not located near electric utility service lines. Electrical utilities are not provided by SWS, GVA and GVAII. Installation costs for electric service to the sites of individual purchasers could be up to $2500.00 (See Affidavit of Richard Gwartney—FTC Exhibit No. 156).

18. The land upon which SWS, GVA and GVAII are located is semi-arid to arid. The approximate rainfall is between eight and nine inches per annum. The land for the most part is level or gently undulating. Significant portions of the land which has been sold to purchasers are mountainous with rock outcropings (See Testimony of Stephen T. Holtz). Crops cannot be farmed successfully in the area in which SWS, GVA and GVAII are located absent extensive irrigation. Due to the high cost of installation of irrigation wells and irrigation systems economic farming in the area requires parcels of land under cultivation of at lease 160 to 320 acres (See Affidavit of Finley Gunter—FTC Exhibit No. 156; Testimony of Martha V. Conoly). Economically feasible ranching in the area requires a parcel of twenty to twenty-five sections[1] of land (Id). The present fair market value of land comparable to that located at SWS, GVA and GVAII in the Van Horn area would be $70 to $75 per acre provided the sale was for a tract of one section or more (Id.). Tracts of five to twenty acres, such as those found at SWS, GVA and GVAII have no resale value at the present time, nor have such sites had any resale value since the time that SWS, GVA, GVAII, its agents and employees and Porter Realty, Inc., and its agents and employees began sales to purchasers.

[1] A section of land is one square mile.

19. Beginning in June 1979 purchasers of tracts at SWS were assessed $15.00 per quarter for golf course and road maintenance (See Hearing, Plaintiff's Exhibit 4). At the present time road maintenance at SWS consists of periodic grading of the main roads in the development (See Testimony of William Gilmore). A nine-hole golf course was constructed in early 1979, but is presently unplayable (Affidavit of J. W. Lowry—FTC Exhibit No. 160). During 1979 fewer than six persons played golf on the SWS course (See Testimony of William Gilmore).

The Court further finds:

20. During the relevant periods of time from 1973 through June 1979 SWS, GVA and GVAII, Porter Realty, Inc., its agents and employees sold parcels of the property to purchasers at a cost of approximately $600.00 to $700.00 per acre. The majority of persons contacted and who entered into purchase contracts with SWS, GVA and GVAII were not residents of the State of Texas. The vast majority of all purchaser entered into the sales purchase contract (See FTC Exhibits No. 74, 75, 76, 77 and 78) without seeing the properties or the specific parcel which they agreed to purchase. During the period of time that Porter Realty, Inc. was engaged in the sale of properties for SWS, GVA and GVAII (FTC Exhibit No. 37a-c) and continuing thereafter until on or about June 1979 Porter Realty negotiated resales of parcels (See Affidavit of Irvin Porter executed on April 10, 1980).

21. The land sales purchase contracts obtained by SWS, GVA, GVAII, its agents and employees and by Porter Realty, Inc., and its agents and employees permitted purchasers to pay principal plus interest over periods of time up to 120 months (e.g. FTC Exhibit No. 173f-g). Under the terms of such contracts title to tracts sold to purchasers would not be transferred to the purchaser until the full price had been paid. Under the terms of such contracts failure to make payment as required would subject the purchaser to cancellation of any interest in the tract of land.

22. There are a large number of land sales contracts which are presently outstanding which have not been abandoned by

the purchasers nor have been cancelled by SWS, GVA and/or GVAII (See Findings of Fact 27, 28, 29 *infra*).

23. There is substantial evidence that SWS, GVA and GVAII, its agents and employees, Porter Realty, Inc., its agents and employees misrepresented to prospective purchasers the following:

a. that tracts located at SWS, GVA and GVAII would double or substantially appreciate in value in a period of two to two and a half years.

b. that oil exploration was taking place on and in the near vicinity of the properties, and that a purchaser could expect to realize a substantial profit upon sale or mineral rights to oil companies. (See Affidavit of Lloyd Cummings—FTC Exhibit 175; Transcript of telephone conversation—FTC Exhibit No. 175-y - 175-ii).

c. that a purchaser of property at SWS would be given a warranty deed guaranteed to be free of all liens, all mortgages (See Hearing, Plaintiff's Exhibit No. 6).

The Court further finds:

24. There is substantial evidence that SWS, GVA and GVAII, its agents and employees, Porter Realty, Inc., its agents and employees omitted and failed to advise prospective purchasers of the following:

a. that the photographs contained in the brochure for SWS (Hearing, Plaintiff's Exhibit 6) taken on the Sunsites' property portrayed small areas of the entire property, and that such pictures were not representative of the appearance of SWS property as a whole.

b. that substantial capital expenditures, in excess of the contract purchase price for the five, ten and twenty acre tracts located at SWS, GVA and GVAII would be required to provide water, electricity and other utilities.

c. that a purchaser of a tract of land at SWS, GVA and GVAII could anticipate and would be required to expend substantial sums of money to prepare the tract for farming, including clearing of the tract, installation of an irrigation system, and for fertilizing and pesticides.

d. that the farming of crops on acreage of less that 120 acres was and would be economically unfeasible.

e. that no oil exploration or production existed near the properties of SWS, GVA and GVAII in Culberson County, Texas.

f. that the City of Van Horn, Texas, and the surrounding area of Culberson, Texas, had experienced no population growth or influx of new industry.

g. that the fair market value of the acreage on which SWS, GVA and GVAII was worth substantially less than the prices set by SWS, GVA and GVAII, that it could not reasonably be anticipated that the value of the property would increase in value in the future, and that tracts of five, ten and twenty acres had none or little market value.

The Court further finds:

25. There is substantial evidence that the misrepresentations and omissions made by SWS, GVA and GVAII, its agents and employees, Porter Realty, Inc., its agents and employees, were material matters and facts which would influence the decision of prospective purchasers to buy or decline to buy tracts on the property of SWS, GVA and GVAII.

26. At the present time the only sales made by SWS, GVA and GVAII are through their agent William Gilmore (see Testimony of William Gilmore). There is no promotional or sales campaign presently being engaged in by SWS, GVA or GVAII. Sales are made on site, the last one having occurred approximately one month ago (Id.).

27. On June 7, 1979, the records of SWS, Inc., and the verified statement of Vice President, Edwin Kritzler, reflect that the total balance of accounts receivable on land sales contracts in the development was the sum of $3,734,981.62 (See FTC Exhibit No. 13d).

28. On June 7, 1979, the records of Green Valley Acres, Inc. and the verified statement of Sydney Gross, its President, reflect that the total balance of accounts receivable on land sales contracts in the development was the sum of $3,855,901.00 (See FTC Exhibit No. 22d).

29. On June 7, 1979, the records of Green Valley Acres II and the verified statement of Sydney Gross, its President, reflect that the total balance of accounts receivable on land sales contracts in the development was the sum of $2,418,402.16 (See FTC Exhibit No. 30d).

30. None of the Defendants has orally or in writing advised persons who have purchased tracts of land at SWS, GVA and/or GVAII, pursuant to land sales contracts, subsequent to the execution of the contract of misrepresentations made by salesmen, contained in the promotional brochures, and/or contained in television or radio commercials.

31. None of the Defendants has orally or in writing advised purchasers subsequent to the execution of land sales contracts of facts or matters which were omitted from representations made by salesmen, contained in the promotional brochures, and/or contained in television or radio commercials.

32. None of the Defendants, their agents and employees has advised purchasers of tracts at SWS from whom road and golf course maintenance fees have been solicited that a playable golf course does not exist on the property of SWS.

33. SWS, GVA and GVAII presently owe Porter Realty, Inc. approximately $120,000.00 as residual commissions from sales made by Porter Realty, Inc., its agents and employees of land on behalf of SWS, GVA and GVAII. Such sums become payable upon receipt of monthly payments pursuant to land

sales contracts obtained by Porter Realty, Inc., its agents and employees.

34. The Court further finds that the evidence adduced by the FTC is sufficient to establish that the Defendants are and have been engaged in acts and practices in violation of § 5 of the Federal Trade Commission Act, and that the evidence is sufficient to establish a likelihood of success on the merits of a complaint to be filed before the Federal Trade Commission.

35. The Court finds that the evidence adduced by the Plaintiff FTC establishes that it would be in the public interest to maintain the status quo during the pendency of the administrative proceeding.

CONCLUSIONS OF LAW:

A. *Positions of the parties*:

Before making specific Conclusions of Law it is appropriate to consider the relative positions of the parties concerning the nature and scope of relief which this Court is authorized to grant pursuant to the provisions of § 13(b) of the Federal Trade Commission Act (15 U.S.C. § 53(b)). Plaintiff seeks a preliminary injunction enjoining the Defendants from continuing to engage in acts or practices in violation of § 5 of the Act (15 U.S.C. § 45(a)(1)). In addition, however, Plaintiff seeks as part of any preliminary injunction entered by the District Court a requirement that SWS, GVA and GVAII and Defendants Gross and Kritzler individually establish an escrow account for all future purchaser payments on presently outstanding land sales contracts. For the reasons set out about consideration of injunctive relief as to the individual Defendants is pretermitted. As part of the order sought, Plaintiff seeks to enjoin the above named corporations from disbursing future purchaser payments, except for payments necessary to maintain underlying mortgages on the land, property taxes, and reasonable overhead expenses. Plaintiff additionally seeks to enjoin any further payments for collection of deferred commissions by Porter Realty, Inc. and Irvin Porter individually.

The plain meaning of the language authorizing the Commission to seek a preliminary injunction is to permit temporary relief or restraint of alleged unfair practices pending an adjudication before the Federal Commission. Thus it is clear that the scope of relief authorized must be limited to the scope of relief or restraint which ultimately may be imposed by the Commission. Being ancillary to the actions authorized to the Commission, the Court necessarily must consider the provisions of proceedings arising under § 5 (15 U.S.C. § 45(a)(1)). It is readily apparent that the Commission is authorized to enter an order requiring a person, partnership or corporation to cease and desist from using unfair methods or practices violative of § 5. The Commission is not empowered to require a party found to have engaged in unfair methods of competition to make restitution, nor are any damages recoverable except as penalties for violation of an order issued by the Federal Trade Commission.

This Court is well aware of the fact that the Commission is authorized to bring an action for recission or reformation of contracts, the refund of money or return or property and the payment of damages (See §19(a)(2) of the FTC Act [15 U.S.C. §57(b)(a)(2)]). However, it would appear that the FTC's construction of this statutory provision requires that the FTC enter a "cease and desist" order, as a condition precendent to the institution of a civil action for the above specified relief. (See *FTC v. Turner,* 609 F.2d 743 (5th Cir. 1980)). This position is reemphasized in the Plaintiff's Memorandum in Support of the Application for Preliminary Injunction at page 3. Clearly under the FTC's construction of this provision it is apparent that no such action will be instituted until termination of an FTC administrative hearing and the entry of a cease and desist order. There is no assurance as to when the administrative proceeding will be held nor whether the Commission will subsequently choose to pursue an action under §57(b)(a)(2), *supra.* Moreover, the present investigation by the FTC in no way precludes an individual from seeking relief on his own behalf, as some of the purchasers appear to have done relative to SWS, GVA and GVAII. Under the circumstances of the present case and more particularly in light of the

language of the statute pertaining to preliminary injunctive relief I am of the opinion that the Court is without jurisdiction to require the institution and maintenance of an escrow account consisting of future installment payments made by purchasers of tracts at SWS, GVA and GVAII.

The Defendants contend that they no longer are soliciting sales or using brochures, advertising in the print or electronic media or are using sales methods which may constitute unfair acts or practices under the Federal Trade Commission Act. They contend further that a "cease and desist order" pursuant to a preliminary injunction entered by the District Court is unnecessary. The Defendants' mechnical approach to the necessity or lack thereof of a "cease and desist order" is inappropriate. The evidence developed in the hearing conducted by this Court as well as the affidavits and exhibits tendered by the Federal Trade Commission sufficiently demonstrate and establish that the Defendants continue to receive and will receive in the foreseeable future monthly payments from in excess of 1000 purchasers of tracts at SWS, GVA and GVAII, and further that such purchasers entered into land sales purchase agreements as a result of misrepresentations and omissions material to the advisability and profitability of the purchase of tracts on such properties. There is substantial evidence to reflect that such former purchasers continue to rely on such representations made by the Defendants in the course of their sales of tracts in continuing the making of monthly payments. There is no evidence to reflect that the Defendants in any manner have apprised those persons currently making payments under contracts of material facts which were either misrepresented or omitted at the time of the execution of the contracts. Under such circumstances the Defendants are continuing by reason of their continued acceptance of monthly payments to make statements and omit material facts which are reasonably likely to constitute deceptive acts and practices in violation of the FTC Act. Preliminary injunctive relief should be granted to cause the Defendants to cease and desist continuation of such practices and acts.

It further appears that although Porter Realty, Inc., is no longer actively engaged in the sales of properties at SWS, GVA and GVAII, Porter Realty continues to receive benefits in the form of deferred commissions (See FTC Exhibit No. 38b, 38c, 39; Affidavit of Irvin Porter dated April 10, 1980) and Porter Realty has likewise failed to apprise persons to whom it, its agents and employees sold tracts of land.

B. *Conclusions of Law:*

1. To the extent that any of the foregoing Findings of Fact constitute Conclusions of Law the same are hereby adopted and incorporated by reference as if set out herein.

2. Subject matter jurisdiction in this case arises under §5 (15 U.S.C. §45) and 13(b) (15 U.S.C. §53(b)) of the FTC Act, and 28 U.S.C. §1337 and 1345.

3. This Court has jurisdiction over Defendants SWS, GVA and GVAII, Texas corporations, pursuant to Vernon Annotated Civil Statute of the State of Texas, Article 2029.

4. This Court has jurisdiction over Defendant Porter Realty, Inc., pursuant to Article 2031b, Texas Civil Statues Annotated.

5. This Court is without jurisdiction over the persons of Sydney Gross, Edwin Kritzler and Irvin Porter individually and such Defendants' Motions to Dismiss are meritorious.

6. Venue properly rests in the Northern District of Texas pursuant to 15 U.S.C. §53(b). Corporate Defendants have transacted business in this district by means of advertising, promoting, offering for sale and selling land, located in Texas, to residents of this district, and by collecting payments on contracts for the purchase of such land from residents of this district. Individual Defendants transact business in this district by means of their direction, control and participation in the acts and practices of corporate Defendants.

7. Defendants are "in or affecting commerce", as commerce is defined by the FTC Act, 15 U.S.C. §44.

8. This proceeding arises under §5 (15 U.S.C. §45(a)(1)) and §13(b) (15 U.S.C. §53(b)) of the FTC Act.

§5 provides, *inter alia,* that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." §13(b) permits a federal court to preliminarily enjoin present or imminent violations of §5 in the public interest.

9. Under the statutes and case law pursuant to §5 [15 U.S.C. §45(a)(1)] and §13(b) [15 U.S.C. §53(b)] it is in the public interest to preliminarily enjoin Defendants from further misrepresenting or failing to disclose material facts concerning the investment potential and suitability of the land for use as homesites, farms, ranches or for commercial purposes. The Commission has reason to belive that Defendants are violating or are about to violate §5, as discussed above in the Findings of Fact. The FTC has further met its burden of showing a likelihood of success in proving that these misrepresentations and failures to disclose facts are unfair or deceptive and violate §5. Furthermore, the equities clearly weigh in favor of halting this ongoing deception of the public.

10. This Court has the authority to grant such preliminary relief under § 13(b) and its inherent equitable powers, especially since the public interest is involved. In interpreting the scope of a remedial statute, unless specifically limited, the Court may order such relief as is necessary to effectuate the purpose of the Act. The relief ordered is ancillary to the Court's general equity powers, and need not be expressly authorized by the applicable statute.

RECOMMENDATION:

Based on the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY RECOMMENDED that the District Court enter its order dismissing Plaintiff's complaint as to the Defendants Sydney Gross, Edwin Kritzler and Irvin Porter.

IT IS FURTHER RECOMMENDED that the District Court enter its order that Defendants Southwest Sunsites, Inc., Green Valley Acres, Inc., Green Valley Acres, Inc. II, Porter Realty, Inc., their officers, agents, representatives, servants,

employees and all persons in active concert or participation with them, including but not limited to Sydney Gross Collection Agency and Blue Chip Ranch, Inc., together with any other such persons who receive notice of this order be, and the same hereby are enjoined as follows:

A. Defendants shall not misrepresent or fail to disclose material facts to prospective purchasers or purchasers of land in Southwest Sunsites, Green Valley Acres or Green Valley Acres II concerning the investment potential of the land, its usability as homesites, farms, ranches or for commercial purposes, or the economic and practical circumstances which restrict its suitability for such uses. Such disclosures shall include, *inter alia,* the availability of and cost of obtaining water and utilities.

B. Corporate Defendants shall notify the Commission and the Court in advance of any change in their corporate status or structure which may affect enforcement of this order.

IT IS FURTHER RECOMMENDED that in implementation of the order directing the corporate Defendants to cease and desist from engaging in unfair trade practices and to effect the purposes thereof that the corporate Defendants SWS, GVA and GVAII, their officers, agents and employees, be enjoined from receiving and depositing monthly installment payments on sales contracts currently in effect hereinafter tendered by persons who have executed land sales purchase contracts on tracts located at SWS, GVA, GVAII until such time as the corporate Defendants have advised such purchasers of possible misrepresentations which may have been made at the time such land sales purchase contracts were executed as well as omissions of material facts which may have occurred at the time of the execution of such contracts. It is recommended that notification to purchasers be given by mailing to such purchasers by certified mail, return receipt requested, copies of the findings and conclusions of the Magistrate as may be adopted by the Court concerning misrepresentations and omissions which may have been made at the time of such purchases or by other written notice not inconsistent with such findings as may be adopted. It is further recommended that the order enjoin SWS, GVA and GVAII, their officers, agents or employees from

transferring or tendering sums of money arising out of the future receipt of such monthly installment payments to Porter Realty, Inc., in payment of deferred commissions owing until such time as notification shall have been given by SWS, GVA and GVAII to the above described purchasers.

IT IS FURTHER RECOMMENDED that in implementation of the order directing the corporate Defendants to cease and desist from engaging in unfair trade practices and to effect the purposes thereof that Porter Realty, Inc., be enjoined from receiving deferred commissions for sales of tracts at SWS, GVA and GVAII until such time as Porter Realty, Inc., has notified those purchasers sold to by Porter Realty, Inc., of possible misrepresentations which may have been made at the time such land sales purchase contracts were executed as well as omissions of material facts which may not have been provided at the time of the execution of such contracts. It is recommended that notification to purchasers be given by mailing to such purchasers by certified mail, return receipt requested, copies of the findings and conclusions of the Magistrate as may be adopted by the Court concerning misrepresentations and omissions which may have been made at the time of such purchases or by other written notice not inconsistent with such findings as may be adopted.

IT IS FURTHER RECOMMENDED that as part of the Court's order it specify that the order shall remain in effect until the complaint in the administrative proceeding which the Commission intends to issue against Defendants is dismissed or set aside by a court on review or until an order of the Commission made thereon has become final, or until further order of this court; provided, however, that if said complaint initiating the administrative proceeding is not issued by the Federal Trade Commission within twenty (20) days of this order, this order shall be come void and of no effect.

/s/ WM. F. SANDERSON, JR.
United States Magistrate

UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES UNLAWFUL. COMPLAINTS, FINDINGS, AND ORDERS OF COMMISSION. APPEALS. PENALTIES, MANDATORY INJUNCTIONS. CIVIL PENALTY ACTION FOR VIOLATION OF RULE, ORDER TO CEASE AND DESIST. DAILY PENALTIES. ISSUES OF FACT. COMPROMISE SETTLEMENTS WITH PUBLIC STATEMENT. (38 Stat. 719; 52 Stat. 111; 64 Stat. 21; 66 Stat. 631; 72 Stat. 942; 87 Stat. 591; 88 Stat. 2193; 89 Stat. 801; 15 U.S.C. 45).

Sec. 5 (a) (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

* * *

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to

cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in Section 2112 of Title 28, United States Code. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question deter-

mined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitiors *pendente lite*. The finding of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply the the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subjected to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) An order of the Commission to cease and desist shall be come final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall be come final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(i) If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals, shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

* * *

INJUNCTION AGAINST DISSEMINATION OF FALSE ADVERTISEMENT. TEMPORARY RESTRAINING ORDERS. INJUNCTIONS AGAINST VIOLATIONS OF ANY PROVISION OF LAW ENFORCED BY FTC (52 Stat. 114: 87 Stat. 592; 15 U.S.C. 53).

* * *

Sec. 13(b) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further,* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

* * *

CONSUMER REDRESS. CIVIL ACTION FOR VIOLATION OF RULE, ORDER TO CEASE AND DESIST. JURISDICTION OF COURT TO GRANT RELIEF. NOTICE OF ACTION. STATUTE OF LIMITATIONS. (88 Stat. 2201; 15 U.S.C. 57b)

Sec. 19. (a) (1) If any person, partnership, or corporation violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 5 (a)), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection

(b) in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 5 (a) (1)) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

(b) The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

(c)(1) If (A) a cease and desist order issued under section 5 (b) has become final under section 5 (g) with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice, and (B) an action under this section is brought with respect to such person's, partnership's, or corporation's rule violation or act or practice, then the findings of the Commission as to the material facts in the proceeding under section 5 (b) with respect to such person's, partnership's, or corporation's rule violation or act or practice, shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's findings shall not be conclusive, or (ii) the order became final by reason of

section 5(g)(1), in which case such finding shall be conclusive if supported by evidence.

(2) The court shall cause notice of an action under this section to be given in a manner which is reasonably calculated, under all of the circumstances, to apprise the persons, partnerships, and corporations allegedly injured by the defendant's rule violation or act or practice of the pendency of such action. Such notice may, in the discretion of the court, be given by publication.

(d) No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) relates, or the unfair or deceptive act or practice to which an action under subsection (a)(2) relates; except that if a cease and desist order with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice has become final and such order was issued in a proceeding under section 5(b) which was commenced not later than 3 years after the rule violation or act or practice occurred, a civil action may be commenced under this section against such person, partnership, or corporation at any time before the expiration of one year after such order becomes final.

(e) Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.

Opposition

Office - Supreme Court, U.S.
FILED
APR 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1543

In the Supreme Court of the United States

OCTOBER TERM, 1981

SOUTHWEST SUNSITES, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a district court exercising equitable jurisdiction under Section 13(b) of the Federal Trade Commission Act to preserve the status quo pending administrative proceedings has recourse to the full range of remedies traditionally available to a court of equity including, in an appropriate case, an order designed to bar dissipation of assets.

2. Whether a preliminary injunction meets the specificity requirement of Fed. R. Civ. P. 65(d) when it details the misrepresentations and omissions of material fact made by petitioners in connection with interstate sales of undeveloped land, and directs that petitioners "cease and desist from making misrepresentations or failing to disclose material facts to purchasers and prospective purchasers concerning investment potential and suitability of land * * * regarding usability as homesites, farms, ranches or for commercial purposes."

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BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 665 F. 2d 711. The order of the district court (Pet. App. 21a-26a) and the findings, conclusions and recommendations of the United States Magistrate (Pet. App. 27a-51a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1982. The petition for a writ of certiorari was filed on February 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, prohibits, *inter alia*, unfair and deceptive acts and practices in or affecting commerce, and establishes an

administrative procedure for adjudication of possible violations of the Act. When such violations are found, the Commission is empowered to issue a cease and desist order which becomes final after opportunity for judicial review. On the basis of such an order, the Commission may thereafter commence a civil action for consumer redress pursuant to Section 19 of the Act, 15 U.S.C. 57b. To prevail in such a proceeding, the Commission must persuade the district court that the act or practice to which the cease and desist order relates is one that a reasonable man would have known, under the circumstances, to be dishonest or fraudulent. The court may then grant such relief as it finds necessary to redress injury to consumers or others resulting from such act or practice. The relief that may be granted under Section 19 includes "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the * * * act or practice" 15 U.S.C. 57b(b).

The Commission may also sue for injunctions to preserve the status quo during administrative proceedings. Section 13(b) of the Act, 15 U.S.C. 53(b), provides that whenever the Commission has reason to believe that a person, partnership or corporation is violating or is about to violate any provision of law enforced by the Commission, and that an injunction pending the Commission's administrative proceeding is in the public interest, it may bring suit in a district court to enjoin any such act or practice. If the court, upon weighing the equities and considering the Commission's likelihood of success, concludes that such action would be in the public interest, it may grant a preliminary injunction.[1]

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[1]Section 13(b) also empowers district courts to issue permanent injunctions in appropriate cases without any need for administrative proceedings. That grant of authority is not at issue here.

2. On March 4, 1980, the Commission filed a Section 13(b) action against petitioners and others, seeking a preliminary injunction pending the filing and adjudication of an administrative complaint before the Commission. The complaint charged that petitioners were violating Section 5 by inducing consumers to enter into contracts to purchase land by statements which misrepresented the value of the land, its investment value, the purposes for which it could be used and the economic situation in the surrounding area, and by statements that omitted material facts relating to the availability of water and utilities and the cost of obtaining water and utility services. In addition, the complaint sought an order directing that petitioners' assets be preserved so that complete relief could be afforded by the Court in a subsequent consumer redress action under Section 19 (Pet. App. 2a).

After a hearing before a magistrate and considering the magistrate's report and objections thereto, the district court found that the land being sold by petitioners had little or no resale value in the lot sizes sold to consumers; that it had little potential for any of the uses petitioners claimed for it; that petitioners had failed to reveal that ground water was not available on some lots and was located at least 325 feet below the surface of the remaining lots; and that petitioners had failed to reveal the high cost of obtaining utility services and of drilling water wells to the depths required (Pet. App. 22a-25a).[2] The district court concluded that petitioners were engaged in or were about to engage in practices that were likely to be found violative of Section 5, that the equities weighed in favor of issuing an injunction, and that an injunction was in the public interest (Pet. App. 7a).

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[2]The district court adopted, in part, and supplemented, in part, the magistrate's findings (Pet. App. 21a-24a; 29a-37a).

The district court nevertheless declined to grant further relief aimed at preserving petitioners' assets for a consumer redress action by the Commission under Section 19. The court held that its remedial authority under Section 13(b) was limited to enjoining the particular acts and practices found likely to violate Section 5 (Pet. App. 25a). The court reasoned that any injunction should be limited to relief designed to "protect * * * the general public from unfair trade practices," rather than to protect the rights of particular defrauded purchasers to refunds or other relief under Section 19 (*ibid.*). The district court further stated that, assuming such preliminary relief were available in a Section 13(b) proceeding, it should not be granted absent "a strong showing of dissipation of assets," which, the court believed, had not been made (Pet. App. 25a). Based upon the foregoing findings and conclusions the district court ordered (*id.* at 26a) that petitioners

> cease and desist from making misrepresentations and failing to disclose material facts to purchasers and prospective purchasers concerning investment potential and suitability of land in [petitioners' subdivisions] regarding usability as homesites, farms, ranches or for commercial purposes.

3. On cross-appeals by the Commission and petitioners, the court of appeals affirmed the district court's order insofar as it enjoined further violations of Section 5, and reversed and remanded for further proceedings insofar as the district court had denied the Commission relief it had requested (Pet. App. 20a). The court of appeals rejected the district court's assumption that its remedial powers under Section 13(b) were limited to granting such relief as the Commission could afford in an administrative proceeding. Applying the principles of *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960); *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), and their progeny, the court of

appeals held that, in the absence of a clear expression of contrary intent by Congress, in a Section 13(b) action, the district court retained the full range of its traditional equitable powers to carry out the purposes of the Federal Trade Commission Act (Pet. App. 8a-16a). Noting the absence of any indication of congressional intent to limit those powers (*id.* at 11a), Congress' clear intent that defrauded consumers be afforded an effective restitutionary remedy under Section 19 (Pet. App. 13a), and the essentially unitary nature of the Section 5 administrative proceeding and the ensuing application to court for consumer redress (Pet. App. 12a), the court of appeals held that "in the exercise of [its] inherent equitable jurisdiction [under Section 13(b)] the district court may order temporary, ancillary relief preventing dissipation of assets or funds that may constitute part of the relief eventually ordered" in a Section 19 consumer redress action (Pet. App. 10a).

The court of appeals also held (Pet. App. 16a-17a) that the standard suggested by the district court (in dictum) for determining whether sequestration of funds should be ordered was improper, and that, on remand, the court should consider (a) "whether such relief is 'reasonably necessary' in order to preserve the possibility of complete and meaningful relief at the conclusion of litigation (*id.* at 17a; citations omitted)" and (b) the likelihood that the Commission will succeed in persuading the district court in the Section 19 proceeding that the acts and practices in question are ones that "a reasonable man would have known under the circumstances [were] dishonest or fraudulent." 15 U.S.C. 57b(a)(2). The court of appeals directed the district court to "reexamine the evidence" in light of its discussion of the scope of relief available under Section 13(b) (Pet. App. 17a, 20a).[3]

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[3]In addition to remanding for further consideration of whether an injunction against dissipation of assets is warranted, the court of

Finally, turning to petitioners' cross-appeal, the court of appeals held that the record concerning petitioners' past and ongoing practices fully supported the grant of injunctive relief against future violations of the Act (Pet. App. 18a-19a). The court also rejected petitioners' contention that the district court's injunctive order (see page 4, *supra*) failed to comply with the specificity requirement of Fed. R. Civ. P. 65(d). The court explained (Pet. App. 19a):

> We find nothing impermissibly vague about the use of the terms "misrepresentation" and "failure to disclose material facts" in the context of the district court's order, particularly because the order does expressly describe the difficulty in obtaining utility services for the property and the economic [in]feasibility of the land for farming, ranching or commercial purposes in the small parcels made available. There seems to be little danger that the [petitioners] will misapprehend what misrepresentations and omissions are pr[o]scribed or that appellees will be liable to contempt citations for activities not contemplated by this order.[4]

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appeals returned to the district court for reappraisal the question whether an order directing that petitioners notify their prior purchasers of the ongoing proceedings is warranted (Pet. App. 17a-18a). Petitioners do not explicitly challenge that disposition in their petition.

[4]The court of appeals did conclude, however, that to the extent the meaning of the injunctive portion of the order was clarified by the district court's findings of past material misrepresentations and omissions, the district court's incorporation by reference in the court's order of some of the magistrate's findings (see note 2, *supra*) constituted a technical violation of the proscription upon incorporation by reference established by Rule 65(d). Conceding that the defect was merely clerical, the court of appeals nevertheless directed that upon remand the district court set out the pertinent findings in haec verba (Pet. App. 19a-20a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is not warranted.

1. The court of appeals did not rule on the merits of the Commission's claims for additional injunctive relief against petitioner, but held only that the district court erred in concluding at this preliminary stage of the proceedings that such relief was unavailable as a matter of law. The Commission must still meet its statutory burden of showing entitlement to such additional relief. On remand the district court may well find that under the standard laid down by the court of appeals no such additional relief is justified. In that event, petitioners will have no cause for complaint. If additional relief is ordered by the district court, petitioners will retain the right to appeal, and, if unsuccessful upon appeal, will be entitled to petition this Court for the review they now seek. Thus, consideration by this Court is not appropriate at this time.

In addition, Sections 13(b) and 19 are relatively recent additions to the FTC Act.[5] Their meaning and scope, and their relationship to the rest of the Act, are still being explored in the lower courts. Indeed, as the court of appeals recognized (Pet. App. 1a-2a & n.1) this is the first appellate decision to address the scope of the district court's Section 13(b) authority in the context of a request for interim relief designed to preserve the possibility of effective redress in a Section 19 proceeding. Only a few cases address the scope of relief available under Section 13(b) in any setting and those

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[5]Section 13(b) was added to the FTC Act on November 16, 1973, by Section 408(f) of the Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 592. Section 19 was added on January 4, 1975, by Section 206(a) of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2201.

have uniformly rejected the narrow reading urged by petitioners. *FTC* v. *H.N. Singer, Inc.*, 668 F. 2d 1107 (9th Cir. 1982) (preliminary injunction including assets freeze upheld in a permanent injunction suit seeking rescission and restitution); *FTC* v. *Virginia Homes Manufacturing Corp.*, No. 81-1187 (4th Cir. July 14, 1981) (unpublished), aff'g 509 F. Supp. 51 (D. Md. 1981) (permanent injunction ordering notice to consumers as well as enjoining future unlawful practices); *FTC* v. *Weyerhaeuser Co.*, 665 F. 2d 1072 (D.C. Cir. 1981) (district court has broad discretion to issue a hold-separate order in lieu of injunction against a proposed merger); *FTC* v. *Exxon Corp.*, 636 F. 2d 1336 (D.C. Cir. 1980) (same). See also *FTC* v. *Travel King, Inc.*, [1977-1] Trade Cas. para. 61,419 (W.D. Wash. 1974) (notice to consumers). Petitioners do not suggest that the decision below conflicts, in this respect, with any decision of any other court of appeals. Further review is accordingly unwarranted.

2. The decision of the court of appeals is in accord with applicable decisions of this Court. Petitioners do not contest the district court's extensive findings of misrepresentations and omissions of material facts in petitioners' sales activities. They argue instead that, having found such serious violations of the FTC Act, the district court was authorized only to enjoin future repetition. This contention is contrary to the teaching of this Court in *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946) and *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), upon which the court of appeals properly relied (Pet. App. 8a-10a). In *Mitchell* this Court held (361 U.S. at 291-292):

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.

And in *Porter* (328 U.S. at 398), the Court had explained:

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.
> * * *
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> Moreover the comprehensiveness of this equitable jurisdiction is not to be denied in the absence of a clear and valid legislative command.

Mitchell and *Porter* are controlling here. Under Section 13(b) the enforcement of the prohibitions of the Federal Trade Commission Act is entrusted to an equity court. Accordingly, the statute must be deemed to grant the district courts comprehensive power to mold their decrees to meet the needs of justice, for it contains no "clear and valid legislative command" limiting the equitable jurisdiction it conveys.

Contrary to petitioners' contention (Pet. 4-5), there is no inconsistency between the decision below and this Court's decision in *De Beers Consolidated Mines* v. *United States*, 325 U.S. 212 (1945). In that case, the United States, by its complaint, sought only injunctive relief against an alleged conspiracy to monopolize trade in violation of the Sherman Act and the Wilson Tariff Act. *Id.* at 215. The United States nonetheless requested an order restraining defendants from selling, or withdrawing from the United States, any of their property located in this country, pending defendants' compliance with any orders the court might issue at the conclusion of the litigation. *Ibid.* Thus in *De Beers* the purpose of the requested order regarding assets was not to ensure that the relief sought directly could be granted, but to provide property to serve as security against the contingency that upon the court's granting the requested permanent injunction, the defendants would disobey the injunction, a fine would be imposed for contempt, and defendants would

refuse to pay the fine. *Id.* at 219-220. Because the United States did not seek money damages directly, and the district court lacked authority to award such relief, the Court concluded that sequestration of assets was not authorized under traditional equity practice. 325 U.S. at 219-222. The Court explained that the sequestration order was unauthorized because "[i]t deals with property which in no circumstances can be dealt with in any final injunction that may be entered." *Id.* at 220. Here, however, the assets the Commission seeks to preserve are part of the subject matter of the Commission's complaint, and would be used directly to satisfy a money judgment explicitly authorized by Section 19. As the Court observed in *De Beers* (325 U.S. at 220): "A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally."

Nor is it significant that any judgment finally affecting the assets would be entered in a separate Section 19 action, filed after the conclusion of the administrative proceedings. This Court has held that federal courts having prospective jurisdiction may issue "all writs necessary or appropriate in aid of their respective jurisdictions," under the All Writs Act, 28 U.S.C. 1651(a). *FTC* v. *Dean Foods*, 384 U.S. 597, 603 (1966).[6] In that case the Court upheld the power of the court of appeals to issue an order preserving the assets of a company acquired by merger, pending the Commission's determination of whether the merger violated antitrust law. The appellate court did not have immediate jurisdiction over the merger at the time the injunction was sought, but had prospective jurisdiction because the respondent could

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[6]See also *FTC* v. *Exxon Corp.*, *supra*, 636 F. 2d at 1342-1344; *FTC* v. *H.N. Singer*, *supra*, 668 F. 2d at 1112. The court of appeals found it unnecessary to decide whether, as the Commission argued, the All Writs Act provides an entirely independent basis for entry of an injunction against dissipation of assets (Pet. App. 16a).

petition the court of appeals for review of any order the Commission might enter against it at the conclusion of the administrative adjudication. This Court held that the All Writs Act granted the court of appeals authority to protect its future jurisdiction through the issuance of an order preserving the status quo. Such authority, it said, was "not confined to the issuance of writs in aid of jurisdiction already acquired." *Id.* at 603-605.

Also without merit is petitioners' argument (Pet. 5-6) that a congressional limitation on the court's power should be inferred from Congress' rejection in 1978 of proposed legislation that would have confirmed district court authority to grant this kind of relief. As the court of appeals observed (Pet. App. 14a n.5), "it is not improper for an agency to seek explicit authorization for powers thought to be somewhat controversial, and any number of reasons for the failure of this subsequent legislation are possible. Courts typically refrain from drawing conclusions from subsequent legislative history for precisely these reasons. See [*FTC* v. *Dean Food Co., supra*, 384 U.S. at 609; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-49 (1962)]."

In their petition, petitioners argue for the first time (Pet. 7, 8) that *Cort* v. *Ash*, 422 U.S. 66 (1975), and its progeny require reexamination of the doctrine of *Mitchell* v. *Robert De Mario Jewelry, Inc.* and *Porter* v. *Warner Holding Co., supra*. Petitioners did not raise this argument below, and should not be heard to raise it for the first time in this Court. *Adickes* v. *S.H. Kress Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, the argument is without merit. *Cort* v. *Ash* addresses implication of a private right of action from a statute that lodges enforcement authority with a government agency. No private right of action is involved here, however, nor is any inference relied upon to supply the district court's remedial authority. The Court's recent focus upon congressional intent in analyzing the

private right of action issue, see, *e.g.*, *Transamerica Mortgage Advisors* v. *Lewis*, 444 U.S. 11, 15-16 (1979), is, in any event, entirely consistent with the teaching of *Mitchell* and *Porter*, for absent any contrary expression of intent, it is most reasonable to assume that Congress has not, by mere silence, stripped a federal court of its powers as a court of equity.

2. As the court of appeals held (Pet. App. 19a), the district court's order fully meets the requirements of Fed. R. Civ. P. 65(d). It specifically describes the misrepresentations and omissions found to violate the Act and clearly enjoins the continued use of them in petitioners' sales. The purpose of Rule 65(d) is to apprise the party enjoined of the course of conduct prohibited (*B & C Truck Leasing Inc.* v. *ICC*, 283 F. 2d 163, 167 (10th Cir. 1960)) so that "[d]efendants * * * [are] never * * * left to guess at what they are forbidden to do * * *." *International Longshoremen's Association* v. *Philadelphia Marine Trade Association*, 389 U.S. 64, 75 (1967). The district court examined the conduct in dispute and made specific findings regarding petitioners' misrepresentations. Those findings clearly identified the violations of the Act found to have occurred.[7] The clear intent and import of the operative paragraphs of the order is to enjoin repetition of those practices. The Fifth Circuit has held that an injunction stated in such terms must be construed as limited to the type of violations which brought it into being and that, so construed, such an injunction is valid. *Russel C. House Transfer & Storage Co.* v. *United States*, 189 F. 2d 349 (5th Cir. 1951). Defendants here have been "informed as accurately as the case permits what they are forbidden to do." See *Swift & Co.* v. *United States*, 196 U.S. 375, 401 (1905); *H.K. Porter* v. *National*

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[7] Any technical defect in the district court's order was fully remedied by the court of appeals remand for correction of the order. See note 4, *supra*.

Friction Products Corp., 568 F. 2d 24, 27 (7th Cir. 1978).[8] Petitioners' argument to the contrary presents no substantial question for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8]The district court's order does not merely recite past violations and then enjoin all future "misrepresentations" and "fail[ures] to disclose material facts." Rather the operative language itself describes the limits of false statements and omissions covered with considerable specificity (see page 4, *supra*). There is no occasion to guess about the meaning of this unambiguous language.